Supreme Court, U.S.
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No. 99-688

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY SANCHEZ, individually and as next friend of Lisa Sanchez,

Petitioner,

v.

LIEUTENANT GARY SMITH, CAPTAIN GILBERT BACA, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELIMO RAEL, PRESIDENT OF NEW MEXICO HIGHLANDS UNIVERSITY, DR. MARGARET GARZA, WILTON ROGERS, NEW MEXICO HIGHLANDS UNIVERSITY, Individually and in Their Official Capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant a petition for writ of certiorari when the only asserted error is that the District Court and Court of Appeals below may have failed to consider all of petitioner's factual assertions or misinterpreted such facts?

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JURISDICTION

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule provides, in relevant part, "A petition for writ of certiorari will only be granted for compelling reasons." The rule then follows with the character of the reasons this Court considers when reviewing a petition for a writ of certiorari. The first reason discussed is in the circumstance where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals. The Petitioner herein has made no such assertion as a reason for seeking review by certiorari. The next enumerated reason deals with the situation where a petitioner is seeking review from a state court ruling which situation is factually inapplicable here. Lastly is the circumstance in which a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court. The Petitioner has not made such an assertion but, rather, argues throughout the petition that the lower courts made factual errors or that summary judgment should not have been granted due to the number of alleged facts involved. Rule 10 addresses this situation by providing "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The Petitioner has failed to present this Court with any compelling reason to grant the requested writ of certiorari.

STATEMENT OF THE CASE

Petitioners Dorothy Sanchez and her daughter Lisa Sanchez (hereinafter collectively "Sanchez") sued New Mexico Highlands University (hereinafter the "University") and certain individuals employed by the University, namely the President of the University, Selimo Rael, the former Dean of Students, Dr. Margaret Garza, and the Director of Human Resources, Wilton Rogers (collectively the "Highlands Defendants"). Sanchez also sued the New Mexico State Police and certain individuals employed by the New Mexico State Police, who are represented by separate counsel. Sanchez brought her action alleging violations under 42 U.S.C. Section 1983 and violations of numerous state law claims.

Sanchez was employed as the director of the Student Support Services program at the University. Her last contract with the University began on September 1, 1995 and terminated August 31, 1996. Aplt. App. 526. The term of the contract was for one year only and terminated on August 31, 1996. Aplt. App. 526.

During Sanchez' last contract with the University, the University became aware of numerous performance deficiencies which existed on the part of Sanchez, including but not limited to: the use of vulgar language to her supervisor Dr. Garza; the conduction of hypnosis on students even though hypnosis was not allowed by the terms of the federal grant which funded the program or by University policy; bailing students out of jail; the allowance of the housing of inmates from the New Mexico Springer Boys School at the University without securing their admission; and numerous other matters. Aplt. App. 540; Aplt. App. 529, p. 18, L. 21-25; p. 19, L. 1; Aplt. App. 533, p. 57, L. 17-20;

Aplt. App. 534, p. 74, L. 10-16; Aplt. App. 535, p. 81, L. 20-25, p. 82, L. 1-3.

Sanchez was directed to cease doing hypnosis on students. Aplt. App. 529, p. 18, L. 21-25; p. 19, L. 1; Aplt. App. 530, p. 23, L. 9-12. In order to substantiate her claim that the Student Support Services grant allowed her to perform hypnosis, Sanchez produced to her supervisor what she represented to be two pages from the grant as approved by the Department of Education in Washington, D.C., which pages contained references to the performance of hypnosis by the director of the program. Aplt. App. 530, p. 24, L. 7-12. The Department of Education confirmed that the pages containing the references to hypnosis were different from those contained in the official grant approved by the Department and that nowhere did the department find any reference to hypnosis in the grant. Aplt. App. 540. Sanchez had therefore altered and falsified the grant document.

Sanchez was provided notice that her contract as director of Student Support Services, which was due to terminate on August 31, 1996, would not be renewed.

In April 1996, a radical Chicano flyer was distributed on the campus of the University, which flyer threatened death, violence, physical harm and property damage against certain named faculty members and University administrative members. The flyer began as follows:

> No More! Those Raza who have used the EL MACHETE to protect and defend sell out Chicanos and Chicanas, must stop, you are abusing the purpose of the MACHETE. RAZA, you must pick your battles carefully. Selimo Rael is the first target in our mission to

> save Highlands. Once we have destroyed this sell out we can then turn our forces against the gringo pigs who think that they will take over this school. Let them believe that we are to [sic] busy fighting with each other, then when the moment comes we can mobilize the Mexican Mafia to burn the gringos homes and families. The gringo does not realize how violent this community can be to outsiders who fuck with us. Hey gringos, look into how many unsolved deaths take place in San Miguel County. Some of these gringos live out in the country, where it takes a long time for the police or fire department to reach them in case of an emergency. We have not forgotten about gringo pigs like: Green, Olsen, Bingham, Clinger, Paradise, Springer and Williams but we must first clean our own back yard.

Aplt. App. 553.

The University requested of law enforcement officials, including the Attorney General's Office and the New Mexico State Police, that an investigation be conducted regarding the flyer. Aplt. App. 563, 564. In the course of conducting its investigation, the New Mexico State Police conducted many interviews and, pursuant to one of the interviews, learned that Sanchez had purchased certain items of equipment for her own benefit with New Mexico state funds and had taken the equipment home. Aplt. App. 569, p. 38, L. 2-3; Aplt. App. 570, p. 71, L. 23-25; p. 72, L. 1-25. The State Police defendants had never met Sanchez and knew nothing of her prior to initiating their investigation. Aplt. App. 568, p. 25, L. 6-9.

The New Mexico State Police informed University officials that they had learned that Sanchez had purchased equipment with state funds and taken the equipment to her home. The University administration indicated that it had not given permission for the purchase of such equipment. Aplt. App. 556, p. 51, L. 23-25; p. 52, L. 1-3; Aplt. App. 557, p. 56, L. 2-5. The State Police obtained a search warrant from State District Judge Harris for the search of Sanchez' home. Aplt. App. 571. The search did result in the discovery of the equipment at Sanchez' home which had been purchased by Sanchez with state funds. The University was informed of the results of the search. Aplt. App. 558, p. 64, L. 11-14.

Upon being informed that the equipment was indeed found at the home of Sanchez, the Director of Human Resources placed Sanchez on suspension from her employment, with pay. Aplt. App. 575, p. 24, L. 16-18. The University had also been informed, by that time, that there were allegations regarding Sanchez' falsification of tax returns and federal income tax information submitted in order to qualify otherwise ineligible students for federal and state financial aid and, thus, the notice to Sanchez indicated that she was under investigation for purchasing equipment with state funds and for other matters. Aplt. App. 576.

Subsequently, the State Police obtained a search warrant in order to search Sanchez' home again and in order to search Sanchez' office. The University Defendants were not informed in any way regarding these searches, except that as a courtesy they were told that the State Police had obtained a warrant to search Sanchez' office on campus. Aplt. App. 577, 578. Sanchez had been implicated by certain individuals who were interviewed by the State Police as a possible author of the threatening flyer. In fact, she had previously authored an anonymous flyer, while employed at the University,

entitled "Juicy Lucy Does Highlands." The flyer was directed against another University employee and accused her of sexual favors in return for job security or promotion. Aplt. App. 718.

The University was subsequently informed that an investigation was ongoing by the United States Attorney's Office regarding Sanchez arising out of her work at the Student Support Services office at Highlands. In June 1996, the University was served with a subpoena for the production of certain documents before a grand jury which convened in Albuquerque, New Mexico. Aplt. App. 580, 581. Subsequently, in September 1997, the University received another subpoena for documents to be produced to the grand jury at the request of a United States Attorney. The subpoena was for documents relating to the Student Support Services office and Sanchez. Aplt. App. 582, 583.

ARGUMENT

I. There is Nothing in the Record to Indicate that the Court of Appeals Rule Requiring Petitioner to File a Single Brief and Allowing the Governmental Entities to File Separate Briefs May Have Caused Incomplete Consideration of the Appeal.

The Petitioner alleges that Rule 31.4 of the Rules of the Tenth Circuit requiring all parties on one side of a case to join in a single brief to the greatest extent practicable, except as to governmental entities, may have somehow prejudiced the Petitioner, with nothing more than speculation to substantiate that assertion. In fact, the Petitioner filed separate reply briefs which were considered and allowed by the Tenth Circuit. The Petitioner claims that because the reply briefs

were filed by the clerk the same day that Petitioner's motion for rehearing was denied, that somehow the Tenth Circuit did not have sufficient time to consider the briefs. In fact, the Court's Order states that both reply briefs were reviewed by the panel prior to issuing its decision. Pet. App. 19a. The Petitioner also asserts that the Tenth Circuit may have had insufficient time to consider the facts in any of her briefing, including, apparently, her brief in chief as well as the lengthy appendix. There is absolutely nothing in the record or any evidence to indicate that the Tenth Circuit did not adequately and properly perform its appellate function in this case. To the contrary, the Tenth Circuit's order states: "[w]e have reviewed the parties' briefs, the appendices, and the district court's oral explanation of its judgment and its opinion." Pet. App. 8a.

II. Summary Judgment Was Properly Granted and Affirmed Despite Petitioner's Assertion That This a "Fact Intensive" Case.

The Petitioner claims that because of the number of facts she believes are relevant in this case, that summary judgment and the affirmance thereof were improperly granted. The Petitioner also claims that alleged factual disputes and the breadth of facts made "digestion by the reviewing court difficult." The reviewing court, however, never indicated that it had any difficulty in digesting the "breadth of facts." It is, of course, well settled that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. In addition, the substantive law will identify which facts are material for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment and factual disputes that are irrelevant or

unnecessary will not be considered. Also, when ruling on a motion for summary judgment, the mere existence of a scintilla of evidence in support of a plaintiff's position will not be sufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Anderson v. Liberty Lobby, *id.*, does not state, as the Petitioner alleges, that summary judgment "is to be used sparingly in fact intensive cases."

A writ of certiorari is not properly granted in this circumstance where the petitioner seeks a review of the evidence or inferences drawn therefrom. General Pictures Co. v. Electric Co., 304 U.S. 175 (1938). It is not for the Supreme Court to reverse a Court of Appeals based on a conflict of evidence. In such situations the Supreme Court adheres to the "usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

III. Petitioner's Assertion of Erroneous Factual Findings is Insufficient to Warrant the Grant of a Writ of Certiorari.

The Petitioner argues that her claim of First Amendment retaliation was improperly dismissed. Petitioner claims that despite her "faultless, 24 year career,"[1] her contract was not extended because the University administration had knowledge from a Mr. Peña that the University was "not [to] retaliate against Petitioner." Pet. 9. Noticeably, the Petitioner does not point to anything in the

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[1]The Statement of the Case, supra, provides references in the record to the performance deficiencies on the part of Sanchez.

record indicating that the University administration was aware of any comments, if made, by the Petitioner. The Court of Appeals dealt specifically with this claim and found that the Petitioner's "conclusory allegations" were insufficient to state a viable claim. Pet. App. 7a. In any event, the Petitioner is again asserting only an alleged factual finding.

The Petitioner's counsel also represents to this Court, with no substantiation, that his client has submitted to an interview with the U.S. Attorney's Office and no charges against Sanchez have been filed. Petitioner states that the Court of Appeals referred to her as being "still under investigation," when in fact the Court of Appeals recited only that the defendants asserted that "this matter [falsified federal financial aid records and other documents] remains under investigation." Pet. App. 3a. The Petitioner claims that the Respondents never did produce any evidence reflective of criminal activity. However, the record reflects that the University responded to two subpoenas to produce documents from the office which the Petitioner headed. Moreover, it was not up to the University to make charges against Sanchez or to evaluate whether criminal activity had occurred. The University knew only that the Petitioner was, and may still be, under investigation.

As to the Highlands Defendants, the Petitioner makes one final argument which is that the Court of Appeals did not discuss certain evidence presented by the Petitioner regarding her claim that she had a property interest in her employment and that because such evidence was not discussed, a petition for writ of certiorari must be granted. There is, however, no indication in the record that the Court of Appeals did not sufficiently review this case and, moreover, Petitioner has cited to no requirement that a court of appeals discuss every argument made by an appellant in its orders and judgments.

The Court of Appeals directly addressed this claim and found that: "Sanchez has failed to show that she had a constitutionally protected property interest in her continued employment." Pet. App. 6a.

CONCLUSION

Because the Petitioner has failed to present any compelling reason as to why this Court shouid grant her petition for writ of certiorari and seeks only to re-argue the facts of her case, the petition should be denied.

Respectfully submitted,

/s/_____
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